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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

The protection of human rights and fundamental freedoms while countering terrorism

Report of the Secretary-General**

Summary

The present report is submitted pursuant to General Assembly resolution 62/159, in which the Assembly requested the Secretary-General to report to it at its sixty-third session on the implementation of the resolution. The report reaffirms the obligation and responsibility of States to protect internationally recognized fundamental rights that could be infringed while countering terrorism. It examines States' practice in protecting non-derogable rights, in particular the right to life and the absolute prohibition of torture and ill-treatment, as well as obligations concerning the transfer of persons suspected of engagement in terrorist activities or deemed to be a threat to national security. The report also examines States' practice to protect human rights and the limitations placed on the exercise of fundamental freedoms and human rights in the context of counter-terrorism, particularly freedom of expression, and considers the impact on the right to a fair trial. The report draws a number of specific conclusions and recommendations directed to Member States.

* A/63/150 and Corr.1.

** The present report was submitted after the deadline in order to reflect the most recent developments.

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Contents

		Page
I.	Introduction	3
II.	States' obligations and responsibilities under international human rights law within the context of counter-terrorism measures	4
III.	Derogatory measures: scope and justification	5
	A. Non-derogable rights	6
	B. Limitations	12
IV.	The right to a fair trial	14
V.	Conclusions	17

I. Introduction

1. In its resolution 62/159 of 18 December 2007, on the protection of human rights and fundamental freedoms while countering terrorism, the General Assembly reaffirmed that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law. It further reaffirmed the obligation of States to respect certain rights as non-derogable in any circumstances and recalled that any measures derogating from the provisions of the International Covenant on Civil and Political Rights (see General Assembly resolution 2200 A (XXI), annex) must be in accordance with the prescribed limitative conditions, and underlined the exceptional and temporary nature of any such derogations.

2. The Assembly called upon States to raise awareness about the importance of these obligations among national authorities involved in combating terrorism.

3. The Assembly encouraged States, while countering terrorism, to take into account relevant United Nations resolutions and decisions on human rights, and encouraged them to consider the recommendations of the special procedures and mechanisms of the Human Rights Council and the relevant comments and views of United Nations human rights treaty bodies.

4. The present report is submitted pursuant to paragraph 21 of resolution 62/159, by which the Assembly requested the Secretary-General to report to it at its sixty-third session on the implementation of the resolution.

5. International and regional human rights protection mechanisms have for many years recognized the legitimate security concerns of States and their duty to protect their citizens from terrorist acts. The present report will consider how States are to handle those concerns while respecting their human rights obligations. Through the adoption of the United Nations Global Counter-Terrorism Strategy (General Assembly resolution 60/288), Member States committed themselves to adopting measures that ensure respect for human rights and the rule of law as the fundamental basis for the fight against terrorism. This position was reaffirmed by the Security Council in its resolution 1624 (2005). In his 2006 report entitled "Uniting against terrorism: recommendations for a global counter-terrorism strategy" (A/60/825), the Secretary-General described human rights as essential to the fulfilment of all aspects of a counter-terrorism strategy and emphasized that effective counter-terrorism measures and the protection of human rights were not conflicting goals, but complementary and mutually reinforcing ones. The Charter- and treaty-based bodies of the United Nations human rights machinery have also frequently observed that the lawfulness of counter-terrorism measures depends on their conformity with international human rights law.

6. The General Assembly decided in its resolution 60/251, that the Human Rights Council should undertake a universal periodic review. The Council's Working Group on the Universal Periodic Review conducted reviews of 32 countries. The reports adopted included references and recommendations on issues related to the protection of human rights and fundamental freedoms while countering terrorism. The documentation which provided the basis for the review also included such references.

7. The present report aims to shed light on recent developments in this field, drawing from the jurisprudence of the Human Rights Committee, notably general comment No. 29 on states of emergency, adopted on 24 July 2001; general comment No. 31 on the nature of the general legal obligations imposed on States parties to the Covenant, adopted on 29 March 2004; and general comment No. 32 on the right to equality before courts and tribunals and to a fair trial.[1] It provides an in-depth analysis of key concerns related to States' obligations under international law with respect to the right to life, the prohibition of torture or cruel, inhuman or degrading treatment or punishment, the freedom of expression and the right to a fair trial, with a view to assisting Member States in discharging their legal obligations in the context of countering terrorism. To this effect, the Office of the United Nations High Commissioner for Human Rights (OHCHR) issued its Fact Sheet No. 32, entitled "Human rights, terrorism and counter-terrorism", in July 2008. The publication is addressed to State authorities, national and international non-governmental organizations, national human rights institutions, legal practitioners and others concerned with ensuring the protection and promotion of human rights in the context of terrorism and counter-terrorism. Its aim is to provide a practical tool for practitioners dealing with counter-terrorism and human rights.

8. The report aims to provide information to Member States on their obligations under international human rights law when taking counter-terrorism measures under Security Council resolutions 1373 (2001) and 1624 (2005). By reiterating those obligations, the report also aims to be of use to United Nations-related counter-terrorism mechanisms, such as the Counter-Terrorism Committee and the Counter-Terrorism Executive Directorate in the implementation of the above-mentioned resolutions.

9. The report focuses on the necessity to respect certain rights as non-derogable in any circumstances and underlines the possibility for States to restrict certain human rights while countering terrorism, by derogating or limiting them in strict compliance with legal conditions defined by customary international law and treaty law.

II. States' obligations and responsibilities under international human rights law within the context of counter-terrorism measures

10. States have a duty to respect, protect and fulfil internationally recognized rights and freedoms. Respect for human rights primarily involves not interfering with their enjoyment. Protection is focused on taking positive steps to ensure that others do not interfere with the enjoyment of rights. The fulfilment of human rights requires States to adopt and implement appropriate measures, including legislative, judicial, administrative or educative measures, in order to fulfil their legal obligations. A State party may be found responsible for interference by private persons or entities in the enjoyment of human rights if it has failed to exercise due diligence in protecting against such acts.

11. Article 2 of the International Covenant on Civil and Political Rights defines the scope of the legal obligations undertaken by States parties to the Covenant. It

[1] The general comments of the Human Rights Committee are available at www2.ohchr.org/english/bodies/hrc/comments.htm.

provides that a State party has the obligation to respect and to ensure the rights recognized in the Covenant for all individuals within its territory and subject to its jurisdiction. The latter phrase refers to anyone within the power or effective control of a State even if not situated within its territory, as confirmed by the Human Rights Committee in paragraph 10 of its general comment No. 31 (para. 10). The enjoyment of the rights enshrined in the Covenant is not limited to the citizens of a State party but must also be available to all individuals, regardless of nationality or statelessness, such as asylum-seekers and refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State party. In its 2004 advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice has, similarly, concluded that "the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory" (A/ES-10/273 and Corr.1, para. 111).

12. Most human rights derive from conventions and customary law. The body of international law encompasses the rights embodied in international human rights treaties as well as those that have become part of customary international law. Thus, all States are legally bound to respect and protect these rights even though they are not party to a particular treaty. Most of the provisions of the Universal Declaration of Human Rights and of the Covenant are now recognized as customary international law and as such must be respected by all States.

13. Part of the State's international obligations, when adopting counter-terrorism measures, consists of exercising due diligence by taking positive measures to ensure the individual protection against any act committed by private persons or entities that infringes on human rights and fundamental freedoms. International human rights law also places a responsibility on States to provide effective recourse and remedies in the event of such infringement.

III. Derogatory measures: scope and justification

14. Member States are bound to ensure respect for human rights and the rule of law as the fundamental basis in the fight against terrorism. To be effective, this commitment should include the development of national counter-terrorism strategies that seek to prevent acts of terrorism and to address the conditions conducive to their proliferation.

15. Counter-terrorism measures are generally incorporated in national legislations. In exceptional national circumstances, some restrictions on the enjoyment of certain human rights may be permissible under the relevant provisions of international human rights treaties. According to paragraph 6 of general comment No. 31 of the Human Rights Committee, where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of rights in the International Covenant on Civil and Political Rights. The scope of limitation of these restrictions is discussed in the following paragraphs.

16. Ensuring both the promotion and protection of human rights and effective counter-terrorism measures raises serious practical challenges for States. These challenges can be surmounted. States can effectively meet their obligations under international law by using the flexibilities built into the international human rights

law framework. Human rights law allows for limitations on certain rights and, in a very limited set of exceptional circumstances, for derogations from certain human rights provisions. The international legal framework of restrictions is specifically conceived to provide States with the necessary flexibility to deal with exceptional circumstances, while at the same time providing the conditions of compliance with international obligations and guarantees of respect and protection of fundamental non-derogable rights.

17. Restrictions and limitations do not always apply to the same rights equally. Certain rights may be limited — if the conditions of the limitations are fulfilled — even if they are non-derogable. Other rights may be limited or derogated from depending on the situation. For example, the right to freedom of expression may be limited to proscribe incitement to terrorism or derogated from in the case of declaring a state of emergency.

A. Non-derogable rights

18. In exceptional circumstances, States may take measures to derogate temporarily from a part of their obligations under international human rights provisions. Article 4 of the International Covenant on Civil and Political Rights allows for State parties to unilaterally take measures to derogate temporarily from a part of their obligations under the Covenant in a situation amounting to public emergency which threatens the life of the nation, subject to a specific regime of safeguards (general comment No. 29, paras. 1 and 2). However, in all circumstances States are expected to enact and implement effective domestic legislation and take the required measures in compliance with their international human rights obligations.

19. In practice, many States resort to declaring a state of emergency to avoid the full implementation of human rights. As such, states of emergency become themselves a major challenge to the fulfilment of human rights. The Human Rights Committee has characterized such an emergency as being of an exceptional nature. Not every disturbance or natural catastrophe qualifies as such. Even during an armed conflict, measures to derogate from the Covenant are allowed only if, and to the extent that, the situation constitutes a threat to the life of the nation (general comment No. 29).

20. Article 4 of the International Covenant on Civil and Political Rights, for instance, requires a number of procedural and substantive safeguards regarding a state of public emergency. The situation must amount to a public emergency which threatens the life of the nation; the existence of a state of emergency must be officially proclaimed; the measures adopted must be limited to the extent strictly required by the exigencies of the situation; derogations must not be incompatible with the derogating State's other obligations under international law; and the derogating State must immediately notify other States parties, through the Secretary-General, of the provisions it has derogated from and of the reasons for such measures, as well as of the date when the derogation has ceased to apply.

21. The reasons often asserted by States for declaring a state of emergency are international armed conflicts, civil wars or violent internal unrest, and serious natural or environmental catastrophes. Whether or not a terrorist act or threat establishes such a state of emergency must be assessed on a case-by-case basis.

Usually, acts of terrorism do not impede the application of normal measures and do not threaten the continuance of the organized life of the community. To trigger a state of emergency, an act of terrorism should be of sufficient gravity to threaten the integrity of the State.

22. As stated before, the derogating State may take only such measures as strictly required by the exigencies of the situation. A derogation from the Covenant must be necessary and proportional. This requirement relates to the degree of interference as well as to the territorial and temporal scope of the measure adopted (Fact Sheet No. 32, pp. 26 and 27). In this regard, the predominant objective of a derogating State must be the restoration of a state of normalcy where full respect for the Covenant can again be secured (general comment No. 29, para. 1). Once such an objective is fulfilled the exceptional and temporal measures must be stopped. This implies that the necessity of the state of emergency itself and the derogation measures should regularly be reviewed by independent organs, in particular the legislative and judicial branch (Fact Sheet No. 32, p. 27).

23. Article 4 (1) of the Covenant states that the exceptional measures must not be inconsistent with other obligations under international law, particularly the rules of international humanitarian law and the peremptory norms of international law. Moreover, any derogation of rights in a time of emergency may not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

24. Not all human rights set out in international human rights law can be derogated from, even in a time of emergency. Article 4 (2) of the International Covenant on Civil and Political Rights lists the provisions that may not be derogated from even in times of public emergency: the right to life; the prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent; the prohibition of slavery, slave-trade and servitude; the prohibition of imprisonment because of inability to fulfil a contractual obligation; the principle of legality in the field of criminal law;[2] the recognition of everyone as a person before the law; and freedom of thought, conscience and religion.

25. Likewise, derogation measures must be consistent with the State's obligations under international humanitarian law. In this context, the minimum provided for in article 3 of the four Geneva Conventions of 1949 must be respected, in particular, the prohibition, at any time and in any place, of violence to life and person, in particular murder, mutilation, cruel treatment and torture, taking hostages and outrage upon personal dignity against persons taking no active part in hostilities. During armed conflicts, the right to life may be restricted only in accordance with international humanitarian law. In its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice stated that "[i]n principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities" (A/51/218, annex, para. 25).

[2] The principle of legality refers to the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that were in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty.

26. It is important to note that, in addition to international humanitarian law, international human rights law continues to apply during armed conflict, subject only to certain permissible limitations in accordance with strict requirements contained in international human rights treaties. In this regard, the Human Rights Committee has stated that "both spheres of law are complementary, not mutually exclusive" (general comment No. 31, para. 11).

27. The Human Rights Committee also identified rights and freedoms under customary law that may not be derogated from even if not listed in article 4 (2) of the International Covenant on Civil and Political Rights. These include the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person; the prohibitions against the taking of hostages, abductions or unacknowledged detention; the international protection of the rights of persons belonging to minorities; the prohibition against the deportation or forcible transfer of population without grounds permitted under international law; and the prohibition against propaganda for war or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence (general comment No. 29, para. 13).

28. In its 2003 advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice posited the applicability of human rights law in times of armed conflict, stating that "the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the [Covenant]" (A/ES-10/273 and Corr.1, para. 106).

Examples of non-derogable rights

The right to life

29. The key and most important non-derogable right is the right to life, which is protected by article 6 of the International Covenant on Civil and Political Rights. Some of the measures that States have adopted to protect individuals from acts of terrorism have themselves posed grave challenges to this right. They include the use of excessive force, "deliberate" or "targeted" killings to eliminate specific individuals as an alternative to arresting them and bringing them to justice, and "shoot-to-kill" law enforcement policies in response to perceived terrorist threats.

30. However, both international and regional human rights law recognize the right and duty of States to protect those individuals subject to their jurisdiction, in times of peace as well as during armed conflict. In particular, "targeted killings" and "shoot-to-kill" measures are explicit violations of the legal and non-derogable obligation under article 6 of the Covenant, which prohibits all arbitrary deprivation of life. International human rights law permits the use of lethal force only when strictly necessary for self-defence or for the defence of another's life, and when in compliance with the principle of proportionality. States must ensure that officers are aware that there is no legal basis for shooting to kill for any reason other than near certainty that to do otherwise will lead to loss of life.

31. Non-lethal tactics for capture or prevention must always be attempted if feasible. In most circumstances, law enforcement officers must give suspects the opportunity to surrender, and employ a graduated resort to force. The State's legal framework must "strictly control and limit the circumstances" in which law

enforcement officers may resort to lethal force. The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,[3] adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990, provide valuable guidance in this respect.

32. States are under obligation to clearly spell out policies in guidelines to military commanders in order to avoid tactics that are based on the use of targeted killing. Before contemplating the use of deadly force, they should exhaust all measures to arrest a person suspected of being in the process of committing acts of terror. In complying with international human rights law they are bound to adopt appropriate procedural safeguards when they resort to the use of lethal force. In addition, complaints about the disproportionate use of force should be investigated promptly by an independent body.

33. "Shoot-to-kill" policies, like "targeted killings", pose a deep and enduring threat to human rights. As noted by the Special Rapporteur on extrajudicial, summary or arbitrary executions, "the rhetoric of shoot-to-kill serves only to displace clear legal standards with a vaguely defined licence to kill, risking confusion among law enforcement officers, endangering innocent persons, and rationalizing mistakes" (E/CN.4/2006/53, para. 45).

34. States have the responsibility to ensure that the entire range of officials operating in the law enforcement machinery discharge their duties in conformity with the law. Extreme vigilance should be applied by those in a position of authority against all forms of abuse of power, especially arbitrary killings.

35. International humanitarian law contains similar provisions against the "targeted killing" of civilians in the context of an armed conflict. One of the fundamental tenets of international humanitarian law is the principle of distinction between civilians and combatants. The prohibition against the targeting of civilians and civilian objects is a basic rule of customary international law.

36. The imposition of the death penalty in cases of defendants accused of terrorism-related offences continues to be of concern. Within this context, there is a need to be vigilant against violation of fair trial guarantees as stipulated in article 14 of the International Covenant on Civil and Political Rights, particularly the right to be assisted by counsel and the right not to be compelled to confess guilt. In cases of trials leading to the imposition of the death penalty, States must ensure scrupulous respect of fair trial guarantees. The imposition of a sentence of death upon conclusion of a trial in which the provisions of article 14 of the Covenant have not been respected constitutes a violation of the right to life (general comment No. 32, para. 59). The combination of the prospect of an unfair trial and a death sentence might amount to inhumane treatment. General comment No. 29 makes the important observation that where the death penalty is contemplated as a sentence, all rights relating to a fair trial contained in article 14 of the Covenant must be fully respected.

37. The use of torture to extract confessions has resulted in some cases in the death of suspects in custody. States must ensure that all deaths in custody are investigated properly and bring the perpetrators to justice.

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[3] See *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. B.

38. Enforced disappearances often include violations of the right to life, as they place the person outside the protection of the law and in most recorded cases end with the death of the suspect. The International Convention for the Protection of All Persons from Enforced Disappearance (General Assembly resolution 61/177, annex) provides that no one should be subjected to enforced disappearance and that each State party should take appropriate measures to ensure that enforced disappearance constitutes an offence under its criminal law. Internal political instability, or any other public emergency, cannot be invoked to justify enforced disappearances. The Convention affirms the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information. States parties should take specific and effective measures to prevent the disappearance of individuals and establish facilities and procedures for the investigation, by an appropriate impartial body, of all cases of missing and disappeared persons in circumstances which may involve a violation of the right to life, among other rights.

The prohibition of torture, cruel, inhuman and degrading treatment or punishment

39. Some States have adopted policies and methods to combat terrorism that, in effect, circumvent and undermine the absolute prohibition of torture and other inhuman or degrading treatment or punishment. This is the case when torture is used to elicit information from terrorist suspects or when they are subjected to secret and incommunicado detention, prolonged solitary confinement or similar measures aimed at causing stress.

40. The prohibition of torture and other cruel, inhuman or degrading treatment or punishment is a peremptory norm and is non-derogable. The right to be free from torture may not be subject to any limitation, anywhere, under any circumstances. It does not yield to the threat posed by terrorism or to the alleged danger posed by an individual to the security of a State.

41. The use of torture and other cruel, inhuman or degrading treatment to elicit information from terrorist suspects is absolutely prohibited, as is the use in any proceedings of evidence obtained under torture, be it at home or abroad. The use of "secret evidence" put forward by prosecuting and other authorities in judicial proceedings constitutes a violation of the principle of admissibility of evidence extracted by torture, as clearly stated in article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[4] Individuals who allege to have been subjected to torture should have their case promptly and impartially investigated and examined by a competent authority and measures should be taken to ensure their protection against ill-treatment or intimidation and degrading treatment as a consequence of their complaint or any evidence given.

42. The use of secret and incommunicado detention, prolonged solitary confinement and similar measures aimed at causing stress may amount to torture, cruel, inhuman or degrading treatment. These measures infringe the protected rights related to the conditions of detentions set forth in the Standard Minimum Rules for the Treatment of Prisoners of 1977, the Basic Principles for the Treatment of Prisoners of 1990 (General Assembly resolution 45/111, annex) and the Body of Principles for the Protection of All Persons under Any Form of Detention or

[4] United Nations, *Treaty Series*, vol. 96, No. 1342.

Imprisonment 1988 (General Assembly resolution 43/173, annex). As under those rights, anyone arrested or detained on criminal charges has the right to be brought promptly before a judge and to be tried within a reasonable amount of time or to be released, the right promptly to challenge the lawfulness of his or her detention before a court and the right to regular access to medical doctors and legal counsel. These procedural guarantees are crucial to ensure compliance with the absolute prohibition of torture.

43. Several international instruments, including the Convention against Torture and the Optional Protocol to the Convention, which entered into force on 22 June 2006, provide for legal and practical measures and safeguards to prevent torture and other inhuman or degrading treatment or punishment. The Subcommittee on Prevention of Torture, established under the Optional Protocol to the Convention, plays a key role in ensuring the protection of persons deprived of their liberty through preventive measures, including visits to the places of detention, advising and assisting States parties in the elaboration of preventive mechanisms for the prevention of torture and other inhuman or degrading treatment or punishment. So far 145 States have ratified the Convention and 35 States have ratified the Optional Protocol.

44. Some States have reportedly extradited, expelled, deported or otherwise transferred foreign nationals, some of them asylum-seekers, suspected of terrorism to their country of origin or to other countries where they allegedly face a risk of torture or ill-treatment. These measures are in violation of the principle of non-refoulement, which must be interpreted as the obligation of States not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. This principle is set out or reflected in several legal instruments, such as the 1951 Convention relating to the Status of Refugees, the Convention against Torture, the International Convention for the Protection of All Persons from Enforced Disappearance and the Covenant.

45. Under international law, the prohibition of refoulement is absolute if there is a risk of torture or other cruel, inhuman or degrading treatment in the receiving country. This obligation also applies in other cases involving a risk for the liberty and the security of the person, including a risk of arbitrary deprivation of life, undue imposition of the death penalty, enforced disappearance, exposure to a manifestly unfair trial, or a risk of infringement of the right to private and family life or the right to an effective remedy.

46. Respect for the principle of non-refoulement requires transparent procedures in the transfer of detainees, consistent with international human rights law and the rule of law, including the obligation to respect the inherent dignity of a person, the right of everyone to recognition before the law and the right to due process.

47. In the context of counter-terrorism, a number of States have made use of diplomatic assurances, memorandums of understanding and other forms of diplomatic agreements to justify the return or irregular transfer of individuals suspected of terrorist activity to countries where they may face a potential risk of torture or other serious human rights abuses. In the absence of legal guarantees, it is of utmost importance that States abide by the principle of non-refoulement and other protection obligations pertaining to the rights of persons deprived of their liberty.

48. States have a positive obligation to ensure that their territory is not used to transfer persons to places where they are likely to be subjected to torture. Consequently, they should take all practical steps to determine whether foreign movements through their territories involve such practices where there are grounds to believe that there is a real risk of irreparable harm. At a minimum, they should ensure that any transfer of persons from one territory to another is undertaken pursuant to a prescription by law and within the framework of international law. In addition, they should ensure judicial oversight and review before the transfer of any detainee and investigate credible allegations of transfers involving a real risk of torture.

B. Limitations

49. States can effectively meet their obligations under international law by using the flexibilities built into the international human rights law framework, provided a number of conditions are fulfilled.

50. According to the International Covenant on Civil and Political Rights[5] certain rights can be subject to limitation. States may resort to those limitations if necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others. However, these limitations are subject to extreme conditions and in order to be lawful they must (a) be necessary in a democratic society, (b) be necessary for public safety or public order and (c) be aimed at a legitimate purpose, namely the protection of public health or morals or the protection of the rights and freedoms of others. The Human Rights Committee has repeatedly emphasized that restrictions must be necessary and proportionate (general comment No. 31, para. 6).

51. Any limitations should also be compatible with the object and purpose of the Covenant and must not be arbitrarily applied. The burden of justifying a limitation on a right guaranteed under the Covenant lies with the State.

52. In order to fully respect their human rights obligations while imposing such limitations, States must respect the principles of equality and non-discrimination.

53. In formulating anti-terrorism laws and regulations, due regard should be given to international legal standards and guarantees. It should be noted that the adoption of any overly vague or broad definition of the term terrorism in domestic legislation could lead to criminalization of conduct that does not constitute terrorism as such (Fact Sheet No. 32, p. 40). There is a danger of such definitions being used as an impediment to the legitimate non-violent and peaceful exercise of fundamental rights and freedoms including group rights, such as labour rights and minority rights, or as a means to limit the expression and capacities of political opposition. States countering terrorism should observe the basic human rights principle of legality, which requires precision in the law and prohibits ex-post facto enforcement of a law or the retroactive criminalization of a conduct. Extrapolation in qualifying criminal offences as "terrorist acts" carries the serious risk of violation of this principle under international criminal law (*nullum crimen, nulla poena sine lege*).

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[5] See, for example, articles 12 (3), 18 (3) and 19 (3) of the Covenant and related details in general comment No. 29.

54. Where a counter-terrorism measure seeks to impose a limitation on a right or freedom, this limitation must be necessary in the pursuit of a legitimate counter-terrorism objective and the impact of the counter-terrorism measure on rights or freedoms must be strictly proportional to the nature of that objective. What is often referred to as "necessary in a democratic society" is an additional safeguard which requires States to demonstrate that the limitations do not impair the democratic functioning of society.

55. Counter-terrorism measures must be rationally connected to the achievement of the pursued objective to meet the principle of necessity. In this regard, it is important to determine how the measure is linked with the countering of an actual or potential threat of terrorism against the State, its contribution to other national interests of the State and its contribution to international and regional frameworks on counter-terrorism.

56. For each of the counter-terrorism measures, States must determine, in relation to restrictions or limitations on the enjoyment of a given right or freedom, whether the impact of the measure on the exercise of that right or freedom is proportional to the objective being pursued by the measure and its potential effectiveness in achieving that objective.

57. The following section deals with the issue of limitation in the context of the right to freedom of expression, a fundamental freedom often affected by security measures enacted in times of national emergency and anti-terrorism policies and strategies.

58. The right to freedom of expression provided for in the International Covenant on Civil and Political Rights covers several aspects, including the freedom to "import information and ideas of all kinds", the freedom to "seek" and "receive" them "regardless of frontiers" and in whatever medium. The exercise of the right to freedom of expression carries with it special duties and responsibilities. The Covenant also provides for restrictions related to the interests of other persons (art. 19, para. 3 (a)) or the community (para. 3 (b)). However, in both cases, those restrictions may not be used to jeopardize the right itself (general comment No. 10, para. 4). Hence, the aforementioned safeguards principles of legality, necessity and proportionality should be fully observed in determining the scope of restrictions imposed on the exercise of the freedom of expression as defined in international human rights law while countering terrorism.

59. In this connection, the proscription of incitement to terrorism could also be considered as an integral part of protection measures to ensure national security and public order through a strict prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.[6]

60. Incitement to terrorism is a strategy commonly used by terrorist organizations to further their cause and provoke violent action. In resolution 1624 (2005), the Security Council identified incitement as conduct which is contrary to the purposes and principles of the United Nations and called upon States to adopt measures to prohibit and prevent it.

61. Incitement must be separated from glorification. If the first may be legally prohibited, the second may not. In the context of the fight against terrorism a

[6] See article 20 of the International Covenant on Civil and Political Rights.

troubling trend has been the proscription of the glorification of terrorism, involving statements which may not go so far as to incite or promote the commission of terrorist acts, but nevertheless applaud past acts. While such statements might offend the sensitivities of individual persons and society, particularly the victims of terrorist acts, it is important that vague terms of uncertain scope such as "glorifying" or "promoting" terrorism not be used when restricting expression. Incitement can be understood as a direct call to engage in terrorism, with the intention that this will promote terrorism, and in a context in which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring. In their fight against terrorism and in order to respect the freedom of expression, States should be careful to differentiate the two notions.

62. Finally, for States to comply with international protections of freedom of expression, laws should only allow for the criminal prosecution of direct incitement to terrorism, that is, speech that directly encourages the commission of a crime, is intended to result in criminal action and is likely to result in criminal action.

IV. The right to a fair trial

63. This section focuses on the key aspects of the right to a fair trial, which is often the most affected by counter-terrorism measures. It draws attention to the jurisprudence of the Human Rights Committee, in particular its general comment No. 32 pertaining to article 14 of the International Covenant on Civil and Political Rights on the right to equality before courts and tribunals and to a fair trial. The Committee notes in its general comment that the right to a fair trial and to equality before the courts and tribunals is a key element of human rights protection and serves to safeguard the rule of law by procedural means. A number of counter-terrorism measures adopted by Member States have had a serious impact on due process-related rights for individuals suspected of terrorism. Guaranteeing due process rights, including for individuals suspected of terrorist activity, is critical for ensuring that anti-terrorism measures are effective and respect the rule of law.

64. In their fight against terrorism, some States conduct activities infringing on basic standards of fair trial. They have resorted to military or specialized courts or tribunals. In particular, they tried civilians in special tribunals of "faceless judges" composed of anonymous judges. Such courts, even if the identity and status of such judges has been verified by an independent authority, often suffer not only from the fact that the identity and status of the judges is not made known to the accused persons but also from irregularities such as exclusion of the public or even the accused or their representatives from the proceedings; restrictions on the right to a lawyer of their own choice; severe restrictions or denial of the right to communicate with their lawyers, particularly when held incommunicado; threats to the lawyers; inadequate time for preparation of the case; or severe restrictions or denial of the right to summon and examine or have examined witnesses, including prohibitions on cross-examining certain categories of witnesses.

65. The right to equality before the courts and tribunals and to a fair trial, set out in article 14 of the Covenant, is a key element of human rights protection and serves as a procedural means to safeguard the enjoyment of other rights. It aims to ensure the proper administration of justice and to this end guarantees a series of specific rights. States should respect rights guaranteed by article 14, regardless of their legal

traditions and domestic law. Guaranteeing those rights is critical for ensuring that anti-terrorism measures respect the rule of law.

66. According to article 14 (1) of the Covenant, all persons must be equal before the courts and tribunals. This general guarantee must be respected whenever domestic law entrusts a judicial body with a judicial task. It prohibits any distinctions regarding access to courts and tribunals that are not based on law and cannot be justified on objective and reasonable grounds. This right guarantees the principle of equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination (general comment No. 32, paras. 7 and 8). Article 14 applies to all courts and tribunals whether ordinary or specialized, civilian or military. Its guarantees cannot be limited or modified because of the military or special character of the court concerned.

67. In cases regarding the determination of criminal charges against individuals or of their rights, as well as their obligations in a suit at law, article 14 (1) of the Covenant establishes the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. These requirements are absolute rights that are not subject to any exception.

68. The notion of fair trial includes the guarantee of a fair and, apart from exceptional circumstances, public hearing. Fairness of proceedings entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive. The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large.

69. The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges and the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, and protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them. A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.

70. The requirement of impartiality has two aspects. First, judges must not allow their verdict to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must appear to a reasonable observer to be impartial. States should ensure that such requirements are respected in all cases.

71. The Committee has noted that the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned. Therefore, it is important to recall that States should take all necessary measures to ensure that such trials take place under conditions which genuinely afford these full guarantees (general comment No. 32, para. 22). Trials of civilians by military or special courts are not prohibited in all cases but should be exceptional, that is, they should be limited to cases where States

can show that resorting to such trials is necessary and justified by objective and serious reasons and where, with regard to the specific class of individuals and offences at issue, the regular civilian courts are unable to undertake the trials.

72. According to article 14, paragraph 2, of the Covenant, everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to law. This right, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proven beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle. States should ensure that all public authorities refrain from prejudging the outcome of a trial. The media should avoid news coverage undermining the presumption of innocence. Furthermore, the length of pretrial detention should never be taken as an indication of guilt and its degree.

73. Persons charged with a criminal offence have a right to a minimum of guarantees in criminal proceedings enshrined in article 14 (3) of the Covenant. It is of great importance, in particular when adopting counter-terrorism measures, that States ensure the respect of such guarantees, including the following:

(a) All accused persons have the right to be informed promptly and in detail of the nature and cause of criminal charges brought against them in a language which they understand;

(b) Accused persons must have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing. States have an obligation to grant reasonable requests for adjournment, in particular when the accused is charged with a serious criminal offence and additional time for preparation of the defence is needed. Lawyers should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications. Furthermore, lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognized professional ethics without restrictions, influence, pressure or undue interference from any quarter;

(c) Accused have a right to be tried without undue delay. This guarantee relates not only to the time between the formal charging of the accused and the start of a trial, but also the time until the final judgement on appeal;

(d) Accused persons have the right to be tried in their presence and to defend themselves in person or through legal assistance of their own choosing; to be informed, if they do not have legal assistance, of their rights; and to have legal assistance assigned to them in any case where the interests of justice so require and without payment by them if they do not have sufficient means to pay for it;

(e) Accused persons have the right to examine the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them. This guarantee does not, however, provide an unlimited right to obtain the attendance of any witness requested by the accused or their counsel, but only a right to have witnesses admitted that are relevant for the defence, and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings;

(f) Accused persons have a right to the free assistance of an interpreter if they cannot understand or speak the language used in the court;

(g) Accused persons have a right not to be compelled to testify against themselves or to confess guilt, in the absence or not of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt.

74. As the right to a fair trial is explicitly guaranteed under international humanitarian law during armed conflict, the Human Rights Committee has expressed the opinion that the requirements of a fair trial must also be respected during a state of emergency. To protect non-derogable rights, States must not diminish the right to take proceedings before a court.

V. Conclusions

75. **The United Nations human rights system continues to address the question of the protection of human rights and fundamental freedoms while countering terrorism with a view to assisting Member States in abiding by their international human rights obligations while effectively combating terrorism.**

76. **The United Nations High Commissioner for Human Rights, human rights treaty bodies and various special procedures mandate-holders of the Human Rights Council have all expressed grave concerns regarding extrajudicial killings and summary executions, the alleged use of secret detention centres and the practice of irregular transfers of persons suspected of engagement in terrorist activities in the pursuit of counter-terrorism activities. Serious concerns also have been expressed over the use of diplomatic assurances to justify the return and transfer of suspects to countries where they may face a risk of torture. States must ensure respect for all rights, in particular non-derogable rights such as the right to life and the prohibition of torture. However, when they undertake derogating measures from some other human rights, they are called upon to respect the restrictions prescribed in the Covenant. Derogation measures should be allowed only in exceptional circumstances, and they should be proportional and necessary.**

77. **Member States should reaffirm their commitment to the total prohibition of torture by prohibiting torture and cruel, inhuman or degrading treatment in national law; prosecuting those responsible for torture and ill-treatment; and prohibiting the use of statements extracted under torture, whether the interrogation has taken place at home or abroad. Measures should be taken to ensure the access of monitoring bodies to all prisoners in all places of detention, and to abolish places of secret detention. Further, Member States should abide by the principle of non-refoulement and refrain from returning persons to countries where they may face torture.**

78. **The entry into force of the Optional Protocol to the Convention against Torture on 22 June 2006 is a significant development towards ensuring the protection of detainees around the world. The Optional Protocol strengthens the Convention against Torture by establishing an international Subcommittee on the Prevention of Torture with a mandate to visit places of detention in States parties and requiring States parties to set up national preventive**

mechanisms, which are also to be provided with access to places of detention and prisoners. The adoption by the General Assembly of the International Convention for the Protection of All Persons from Enforced Disappearance is similarly an important step towards further strengthening the rule of law in countering terrorism. Member States are encouraged to ratify and implement the Convention against Torture and its Optional Protocol and the International Convention for the Protection of All Persons from Enforced Disappearance as an important practical measure of good faith and meaningful commitment to preventing torture, ill-treatment and enforced disappearances.

79. **The Secretary-General calls for added attention to all rights and freedoms described in the present report in the context of ensuring that counter-terrorism measures conform to human rights standards. In his view, States should not need to resort to derogation measures in the area of freedom of expression, assembly and association. Instead, limitation measures, as provided for in the Covenant, are sufficient for an effective fight against terrorism. Such limitations must always be demonstrated to be necessary and proportionate, and subject to judicial safeguards.**

80. **States resorting to military or specialized courts or tribunals in countering terrorism are called upon to accord due attention to the basic standards of fair trial and to the right of equality before the courts in order to ensure a proper administration of justice and respect for the rule of law.**